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No. 575

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In the Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

PURITY FOOD STORES, INC.
(SAV-MORE FOOD STORES),
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the court of appeals (Petition, pages 48-56) is reported at 376 F.2d 497; the court's prior opinion is reported at 354 F.2d 926 (Petition, pp. 20-28). The original Decision and Order of the National Labor Relations Board (J.A. 310-332)[1] is reported at 150 NLRB 1523; the Board's Supplemental Decision and Order (Petition pp. 29-47) is reported at 160 NLRB No. 53.

[1] "J.A." refers to the Joint Record Appendix in the court of appeals. References to exhibits of respondent are sometimes designated "R. Ex.".

Jurisdiction

The revised decree of the court of appeals was entered on May 10, 1967 (Petition, p. 58). On August 1, 1967, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to and including September 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1245(1) and Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e)), hereinafter sometimes referred to as the "Act".

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) are printed in Appendix A, *infra,* (pp. 26-29).

Questions Presented

Whether the decision of the National Labor Relations Board is supported by substantial evidence on the record considered as a whole.

(A) WHETHER A UNIT LIMITED TO THE RESPONDENT'S PEABODY, MASSACHUSETTS STORE IS INAPPROPRIATE FOR COLLECTIVE BARGAINING PURPOSES.

(B) WHETHER THE DECISION OF THE COURT BELOW, IN SETTING ASIDE THAT PART OF THE BOARD'S ORDER REQUIRING RESPONDENT TO RECOGNIZE AND BARGAIN WITH THE CHARGING LABOR ORGANIZATION, WAS CONSISTENT WITH THE PROPER SCOPE OF JUDICIAL REVIEW.

Statement

(A) *The Original Decisions.* In its first decision, issued on February 3, 1965, the Board found that Local 1435, Retail Clerks International Association, AFL-CIO, represented a majority of the employees employed at respondent's Peabody, Massachusetts retail food store; that the Peabody store was an appropriate unit for collective bar-

gaining; that the respondent had committed certain acts which were violative of Section 8(a)(1) of the Act; and that respondent had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the union as representative of the employees in that unit (J.A. 314-320). On review of the Board's order directing respondent to bargain with the union, the court of appeals expressed its concurrence with respondent's charge that the Board's finding "ignores substantial parts of the record, and misstates and misconstrues other parts. . . ."[2] in making its unit determination. The court of appeals remanded the proceeding to the Board for further consideration of the unit question and particularly with respect to respondent's contention that the only appropriate unit in this case was a unit comprising the employees in the respondent's chain of seven retail supermarkets, 354 F.2d 926.[3] The circuit court's decision was issued on December 30, 1965.

(B) *The Board's Decision Following Remand.* Some 8 months later, that is, on August 26, 1966, the Board issued its Supplemental Decision and Order,[4] in which it stated that it had "painstakingly reexamined the entire record including the Court's Decision, and the briefs of the parties", and that "on the basis of the record as a whole, the National Labor Relations Board reaffirms its Order of February 3, 1965, in this proceeding."[5] Upon reviewing the case again, the circuit court stated that ". . . on the evidence and findings in this case we can see no rational basis for fractionating the respondent's organization for purposes of collective bargaining."[6] The court held the

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[2] Petition, pp. 22-23.
[3] Id., pp. 20-28.
[4] Id., pp. 29-47.
[5] Id., pp. 30, 47.
[6] Id., p. 55.

single store unit in this case to be inappropriate and set aside the Section 8(a)(5) findings of the Board.

(C) *The Facts.* The evidence taken at the hearing of the unfair labor practice case established the following facts:

Respondent is a Massachusetts corporation, engaged in the operation of a small chain of seven retail food stores (J.A. 109), all of the stores being located north of the City of Boston and within 30 miles of respondent's central office at Chelmsford, Massachusetts (J.A. 111-112; R. Ex. 1).

In the respondent's stores, including the Peabody store, individual store managers do not have autonomy and are not in charge of the day-to-day operations in their respective stores; the day-to-day operations are controlled by a number of central office executives who, in the truest sense, are responsible for all purchasing in all seven stores (J.A. 124-125, 131-141, 154-155, 263-266); respondent's central office determines what merchandise shall be handled at its stores and the uniform prices at which merchandise is to be sold throughout the chain (J.A. 132-134, 140-142, 146-148); central office executives have the full responsibility for merchandising certain product lines in all 7 stores (J.A. 133-134); central office executives, who exercise certain functions, such as purchasing and merchandising, on a chain-wide basis, are assigned overall responsibility for the operations of specific stores, and literally divide their time between respondent's central office and the stores for which they have such overall responsibility (J.A. 118-119, 150-151, 211-212); there is substantial and continuing interchange of merchandise as between the 7 stores, which has increased since respondent ceased, in March, 1962, to operate a central grocery warehouse (J.A. 113-114, 125, 141-145, R. Exs. 5, 6, 7); to the extent that some merchandise is delivered to the stores by vendors, all of the vendors are

selected by respondent's central office, the prices paid the vendors are negotiated only by respondent's central office executives; vendors are paid directly by the central office, and store personnel are not aware of prices paid by respondent to such vendors (J.A. 131-141); all personnel records are maintained at respondent's central office (J.A. 130-131); daily receipts from all stores are transferred daily to respondent's central bank accounts (J.A. 156-157); all employees of all 7 stores are paid by and from the central office (J.A. 125, 174-175); promotional sales are always conducted on a uniform chain-wide basis (J.A. 148-149); all radio advertisements and some newspaper advertisements identify the locations of all 7 stores (J.A. 177, 208-209); respondent's wage classification structure and wage rates, and its system of automatic length-of-service progression from minimum to maximum wage rates within each job classification are uniformly applied to the employees in all 7 stores (J.A. 181-182); all of respondent's many fringe benefit policies, such as those relating to paid vacations, paid holidays, insurance benefits, paid sick leave, profit-sharing and retirement plan and other benefits, apply uniformly to the employees in all 7 stores (J.A. 182-184); an employee's continuous length of service, that is, his seniority, on the basis of which such matters as the extent of paid vacations are computed, is determined by his total period of employment with the chain as a whole (J.A. 123-124, 176, 260-261, 272-273); general wage increases, when granted, are granted uniformly throughout all 7 stores (J.A. 181-182, 209); respondent contracts with outside firms who render mechanical and laundering services on a chain-wide basis (J.A. 176-177); there is substantial interchange of employees among the 7 stores, on a permanent as well as on a temporary basis, and most transfers are for the convenience of the respondent's chain-wide operations (J.A. 171-174, R. Ex. 15); employees of certain

departments, such as meat, produce, and delicatessen, are hired only by central office executives, and full-time grocery clerks are hired either by the central office or by the particular central office executive to whom is assigned overall responsibility for the day-to-day operations of a particular store (J.A. 122, 153-155, 165-166, 203-204, 211-212, 261-265, 416-417); most part-time employees are hired by the central office executive who divides his working time between respondent's central office at Chelmsford and the particular store for which he has overall responsibility (J.A. 153-154, 165-166); and all cashiers, whether full-time or part-time, are trained by a central office executive who makes the final determination of whether the employees are qualified for the cashier's work and whether they are to be retained or terminated (J.A. 153-154, 262-263). Almost all firing is handled by the central office executive who, in addition to his chain-wide duties, has overall responsibility for the particular store, and no discharges are effected without consultation with that executive (J.A. 166). The number of employees to be utilized in each store is determined by the central office on the basis of a certain chain-wide formula (J.A. 168-169, 204-206). Unemployment, withholding and Social Security taxes are handled on a chain basis at the Chelmsford office, and Workmen's Compensation insurance and public liability insurance are purchased on a chain-wide basis (J.A. 175). A Company newspaper is distributed to all 7 stores (J.A. 175). An annual picnic is held for the employees in all 7 stores (J.A. 175). A single employment application form is used in all stores, and all new employees, to whichever store they may be assigned, receive the same employee's manual of rules (J.A. 166-167). A single security officer, working out of the central office at Chelmsford, handles cases of employee dishonesty for all 7 stores (J.A. 170, 206). Some employees regularly divide their normal workweek between two stores, and frequently an employee,

in addition to performing his normal workweek in one store, works overtime in another store (J.A. 174-175). In all such cases, the employee dividing his time between two stores is paid by a single check issued by respondent's Chelmsford office (J.A. 174-175).

The central office executives determine how stock shall be stocked and displayed in all the stores, and even prescribe the uniform methods by which meats are to be cut in all 7 stores (J.A. 133, 145-146).

Argument

Introduction

Neither the petitioner's statement of "Question Presented"[7] nor that portion of its brief entitled "Reasons for Granting the Writ",[8] makes quite clear what Board policy appears endangered by the decision of the court below. Throughout its argument, petitioner speaks alternatingly of (a) its unit policy in the retail industry as that policy was adopted in 1962 in *Sav-On Drugs, Inc.*, 138 NLRB 1032, 1033, and (b) a policy first enunciated in 1964 in *Frisch's Big Boy Ill-Mar, Inc.*, 147 NLRB 551, where the Board stated that "a single store unit is presumptively appropriate."

(1) Prior to 1962, the Board policy held that the appropriate unit in a retail chain should consist of all the employees within an administrative division or a geographical area. *Weis Markets, Inc.*, 125 NLRB 148 (1959); *Daw Drug Co.*, 127 NLRB 1316 (1960).

(2) In *Sav-On Drugs, Inc.*, the Board, in 1962, revised its unit policy in retail chain store cases, and, in holding a one-store unit of that drug store chain appropriate for bargaining, stated that each retail unit case would there-

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[7] Petition, pp. 2-3.

[8] Id., pp. 12-18.

after "be determined in the light of all the circumstances of the case."[9] The Board stated further:

> "...We have simply added the *possibility* . . . .that a single location or a grouping other than an administrative division or geographical area *may be appropriate*..."[10] (Emphasis supplied.)

(3) In 1964, the Board, in *Frisch's Big Boy Ill-Mar, Inc.*, in holding a one-store unit of that chain appropriate, stated that "...a single-plant unit is presumptively appropriate unless it be established that the single plant has been effectively merged into a more comprehensive unit so as to have lost its individual identity. . . ."[11] On the facts of the particular case, the court denied enforcement of the Board's 8(a)(5) order on the grounds that the ten stores of the chain were "...as much alike as peas in a pod."[12] It is significant that in the *Frisch* case, the Board reasserted the policy (earlier enunciated in *Sav-On Drugs, supra*) that "...The Board will determine the appropriateness, or want thereof, of a proposed unit confined to one of two or more retail establishments in a chain, not by any rigid yardstick, but in the light of all the relevant circumstances of the particular case."[13] In *Clermont's, Inc.*, decided in 1965, the Board, in referring to its earlier decisions in *Sav-On* and *Frisch's*, expressly stated, "But those cases do not stand for the proposition that a single-store unit is appropriate in all circumstances. . . ."[14]

The petitioner charges that the court below has rejected

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[9] 138 NLRB 1032, 1033.

[10] Ibid, n. 4.

[11] 147 NLRB 551, n. 1.

[12] *N.L.R.B.* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F.2d 895, 896 (7th Cir. 1966).

[13] 147 NLRB, 551, 552.

[14] 154 NLRB 1397, 1402.

the application of the *Frisch* presumption, but at various points in the Petition, complains that the court below has improperly interfered with the Board's application of the single-unit policy laid down in *Sav-On Drugs, supra.* Respondent submits that both contentions are without merit.

Respondent contends that the Board's Supplemental Decision in the instant case, pays but lip service to its own rule that retail unit questions "be determined in the light of all the circumstances of the case." In its original decision of February 3, 1965,[15] the Board made no reference to any presumption, although *Frisch* had been decided some 8 months earlier.[16] It was only following the court's order remanding the case that the Board, for the first time, in its Supplemental Decision, felt constrained to invoke its policy of presumption, rather than making a full and fair evaluation of the evidence on the record as a whole.

Respondent contends that petition for writ of certiorari should be denied because:

(1) The single store unit here sought is shown by the overwhelming preponderance of evidence to be inappropriate for bargaining purposes.
(2) The Board's presumption fell before an avalanche of rebutting evidence.
(3) The Board's Supplemental Decision is not supported by substantial evidence on the record considered as a whole, but reflects an unreasonable, arbitrary, and even capricious treatment of the evidence.
(4) The decision of the court below is fully consistent with the proper scope of judicial review, and is not in conflict with the decisions of any other circuits.

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[15] J.A. 310-320.
[16] 147 NLRB 551 (June 19, 1964).

I. A Unit Limited to the Respondent's Peabody, Massachusetts Store Only is Inappropriate for Collective Bargaining Purposes.

(A)(1) Respondent cannot be held to have unlawfully refused to recognize and bargain with the union unless the union had been designated or selected by a majority of the employees in a unit appropriate for bargaining.[17] *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146; *Page Aircraft Maintenance, Inc.*, 123 NLRB 159; *Quality Food Markets, Inc.*, 126 NLRB 349.

While Section 9(b) of the Act empowers the Board to determine what constitutes an appropriate unit, its determinations must not be arbitrary or capricious or constitute an abuse of discretion. *N.L.R.B.* v. *Pittsburgh Plate Glass Company*, 270 F.2d 167 (4th Cir.), *cert. denied*, 361 U.S. 943 (1960); *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111; *May Department Stores Co.* v. *N.L.R.B.*, 326 U.S. 376; *Pittsburgh Plate Glass Company* v. *N.L.R.B.*, 313 U.S. 146; *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474. In *Universal Camera Corp.* v. *N.L.R.B.*, *supra*, this Court pointed out that Congress has imposed on the Circuit Courts the "responsibility for assuring that the Board keeps *within reasonable grounds. . .*" (Emphasis supplied)

(2) In making unit determinations, the Board "has traditionally looked to such factors as the community of interest among the employees sought to be represented."[18] Respondent submits that the facts in this case show that the employees in all 7 of its stores have an almost total mutuality of interest in wages, hours, and working conditions, and the seven stores are so integrated that the only unit here appropriate would be a unit of the employees in all

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[17] Section 9(a) of the National Labor Relations Act.
[18] Petition, p. 13.

7 stores. *N.L.R.B.* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F.2d 895 (7th Cir. 1966); *Pittsburgh Plate Glass Company* v. *N.L.R.B.*, 313 U.S. 146 (1941).

In this connection, the court below, in its opinion of December 30, 1965, stated that "it would be difficult to find a more integrated operation."[19]

In its latest decision of May 8, 1967, the court below concluded that:

> "The evidence and the Board's specific findings based thereon disclose a small, compact, homogeneous, centralized and integrated operation. The findings now made confirm this court's previous view that 'it would be difficult to find a more integrated operation, or less difference among employees.' Under some circumstances a single store in a retail chain may constitute an appropriate bargaining unit. *But on the evidence and findings in this case* we can see no rational basis for fractionating the respondent's organization for purposes of collective bargaining." (Emphasis supplied)[20]

The Board's Supplemental Decision is as inadequate and defective as its original decision in the manner in which it treated the record. To the petitioner's contention that unit determinations are left to the Board's expertise, respondent submits that the Board's expertise does not show here, and, furthermore, that expertise may not be substituted for evidence.[21]

(B) *The Board's Supplemental Decision Mistreats the Record.* Despite the Board's claim to have "painstakingly reexamined" the entire record "including the Court's Decision, and the briefs of the parties,"[22] its Supplemental

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[19] Petition, p. 28.
[20] Petition, pp. 54-55.
[21] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 53-54 (1947).
[22] Board's Supplemental Decision, see Petition, p. 30.

Decision paid little heed to the record and to the criticisms made by the court below in its opinion of December 30, 1965.[23]

(1) *Misstatement of the Record.* In determining unit questions in retail chains, the Board has, for many years, attached great significance to the interchange or transfer of employees between the separate establishments. The presence of "'substantial' or 'some' interchange among [retail] locations supports a unit combining them, while 'minimal' or no interchange shows the appropriateness of a single location." 79 Harv. L. Rev. 811, 829-831.[24]

(a) Respondent's Exhibit 15 showed the great frequency with which employees were transferred from one to another of respondent's stores. The Board's treatment of this important exhibit is, at one and the same time, mechanical, careless, misrepresentative of the true contents of the exhibit, and capricious.

(b) The Board mechanically finds that such interchange "represented an average of about one transfer per week" insofar as the Peabody store was concerned.[25] The Board ignores the fact that Respondent's Exhibit 15 shows a total of 557 employee transfers between the 7 stores in the 2-year period covered by the exhibit. In averaging out the 118 transfers into or out of the Peabody store, the Board fails to evaluate the significant facts that in many instances two or more employees were transferred into or out of the Peabody store within a single workweek, and that some employees regularly divide their working time

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[23] Petition, pp. 22-28.

[24] For the significance attached to interchange, see: *Safeway Stores, Incorporated*, 96 NLRB 998 (1951); *Meijer Supermarkets, Inc.*, 142 NLRB 513 (1963); *Banco Credito Y Ahorro Ponceno*, 160 NLRB No. 119 (1966); *Lane Drug Co., Division of A. C. Israel Commodity Corp.*, 160 NLRB No. 86 (1966); *Raymond's, Inc.*, 161 NLRB No. 80 (1966).

[25] Supplemental Decision, n. 16, Petition, p. 42.

between two of respondent's stores.[26] The comments in footnote 10 of the Petition are, in the language of this Court, unacceptable, since they are only "appellate counsel's post hoc rationalizations."[27] Counsel's post hoc comment (in that same footnote) that transfers are on a voluntary basis, neglects to add that transfers were generally for the convenience of the respondent.

(c) The Board's Supplemental Decision grievously misstates an important part of the record when it states:

> "Moreover, the weight to be assigned to employee interchange as a reliable measure of actual, functional integration is lessened where, as here, the Employer has engaged in an unlawful campaign to undermine the designated representative and *the evidence concerning the interchange appears limited to that which occurred after the Employer acquired knowledge of the Union's organizational interest.*" (Emphasis supplied) (Supp. Dec., N. 16; Petition, p. 42).

The uncontroverted facts are:- The union's drive started on May 13, 1964 (J.A. 8-9, 91-92, 304-305, 322-323), and respondent first learned of the drive on that same May 13, 1964 (J.A. 186, 268, 324), while Respondent's Exhibit 15 reflects 557 employee transfers which took place in the 2-year period from June, 1962 to May 30, 1964. Almost all of the transfers shown on Respondent's Exhibit 15 antedate the commencement of the union's drive.

(d) The Board's statement which would denigrate the character and importance of Respondent's Exhibit 15 by relating it to the 8(a)(1) violations by the respondent, is a capricious statement. Evidence and findings of acts of

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[26] Supplemental Decision, n. 16, Petition, p. 42. The court below had expressly commented on this failure by the Board. See Petition, p. 26, n. 18 to 1965 decision of court below.

[27] See, *N.L.R.B.* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438.

interference which are violation of Section 8(a)(1) of the Act have no relevance to the issue of appropriate bargaining unit.

Curiously, the Petition makes no mention of the Board's mistreatment of Respondent's Exhibit 15.

(2) Footnote 16 to the Board's Supplemental Decision[28] dismisses the interchange of merchandise among the 7 stores as failing to reflect "the degree of operational integration necessary to defeat either the separate identity of the Peabody store, or its inherent appropriateness as a bargaining unit." The Board ignores the fact that in March, 1962, respondent gave up its dry grocery warehouse in Chelmsford; and that the stores do not have space in which to store shelf stock, and serve as auxiliary warehouses to one another. In neither of its decisions does the Board either mention or consider Respondent's Exhibits 5, 6, and 7, showing the thousands of interstore transfers of merchandise.

(C) *Geographical Proximity of the Stores.* The Board's Supplemental Decision states, "Being located about 30 miles from Chelmsford, and about 10 miles from the nearest of Respondent's remaining stores, it [the Peabody store] is separated geographically and serves a different trade area from Respondent's other facilities."[29] Respondent submits that there is no evidence supporting the Board's statement that the Peabody store serves a different area. It is arguable that certain of the stores serve some areas in common. The relatively small distance between stores is not here determinative in view of the fact that, from a labor relations point of view, there is a full integration of the employees of all 7 stores with respect to wages, hours of work, and working conditions. Respondent's Exhibits 5, 6, 7, and 15 indicate that both merchan-

[28] Petition, p. 42.
[29] Supplemental Decision, see Petition, pp. 37-38.

dise and personnel are transferred with great frequency among the 7 stores without regard to any geographical separation. Those exhibits indicate numerous such transfers between the Peabody and Saxonville stores, the two most widely separated of respondent's stores. See *Mary Carter Paint Co.*, 148 NLRB 46 (1964), where the Board held all 17 stores of the chain to be so integrated as to constitute one multi-store unit, although 3 of the stores were located 60 miles away from the other 14 stores.

(D) *Board's Generalized Assumptions.* Rather than applying the principle enunciated in *Sav-On Drugs, Inc.*[30] the Board's Supplemental Decision would substitute many generalized assumptions in place of evidence, the assumptions being unsupported by evidence in the record or contrary to the evidence.

(1) The Board concludes, for example, that, ". . . the Peabody store is not dissimilar from the traditional retail chain outlet insofar as it functions as a distinct economic unit within Respondent's overall operations."[31] Not only is there no evidence of what constitutes a "traditional retail chain outlet," but whatever evidence is found on the record on this point is contrary to the Board's assumption. Thus, the uncontradicted testimony established that: While other chains vary the prices of given items from store to store, in the Purity stores prices are uniform throughout the chain (J.A. 132-134, 140-142, 146-150); unlike other companies, respondent does not have an inventory team, but its regular personnel are transferred from store to store to help out on the inventories (J.A. 175-176). There is no evidence that in other chains central office executives, like those employed by respondent, are assigned overall responsibility for certain stores in addition to the performance of their chain-wide functions of purchasing and

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[30] 138 NLRB 1032, 1033.

[31] Supplemental Decision, see Petition, p. 37.

merchandising (J.A. 133-135, 150-151). There is no evidence that any other chain has a formula utilizing chain-wide data for determining how many manhours of employment are to be authorized in operating a given department in one of the respondent's stores (J.A. 168-169).

(2) The Board states that, "The Peabody store employees regularly work together and have common interests in relation to their Employer, *some of which are separate and apart from those of employees in other locations.*" (Emphasis supplied) [32] The Board gives no explanation of this cryptic statement, nor does it state a single significant aspect of employment (whether in terms of wages, hours of work, or conditions of employment) in which the Peabody store employees are "separate and apart," or different from the employees in the other six stores. There is no such evidence of apartheid on the record of this case.

(E) The Board's Supplemental Decision speaks, at many points, of respondent's "centralized control" of its chain of seven stores,[33] of the "administrative structure of the chain",[34] of respondent's "administrative control" over the seven stores.[35] Notwithstanding such centralized administrative control, the Board finds that the individual Peabody store possesses sufficient autonomy [36] so as to warrant the conclusion that the Peabody store is a "distinct, self-contained economic unit," which "will neither preclude Respondent's continued reliance upon centralized policy determinations," and the Board further concludes that "the impact of any labor dispute at the Peabody store is not likely to be felt at the Respondent's other

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[32] Supplemental Decision, see Petition, p. 40.
[33] Petition, p. 37.
[34] Id., p. 41.
[35] Id., p. 42.
[36] Id., pp. 38, 40.

outlets which serve different markets." And finally, says the Board, separate bargaining at Peabody "would not unduly encroach on the Employer's administrative controls."[37] This unexplained judgment, it is submitted, indicates a lack of expertise.

(1) The evidence does not show the Peabody store to be "a distinct, self-contained economic unit," but shows it to be inextricably integrated as part of a chain of stores. It is naive to say that separate bargaining will have no impact upon the respondent's reliance on centralized control. Insofar as its uniform policies concerning wages, hours of work and all working conditions are concerned, separate bargaining would have an obvious and powerful impact.

If respondent, for example, decided to give a general increase, or any new benefit to all employees, or to change a working condition throughout the chain, any such change unilaterally instituted in a unionized Peabody store would be considered an unlawful refusal to bargain. *N.L.R.B.* v. *Katz,* 369 U.S. 736. In the instant case itself, the Board would find respondent guilty of a Section 8(a)(5) violation by reason of the general wage increase given to all employees in September, 1964.[38] A single-store bargaining unit would indeed preclude respondent's continued reliance on centralized policy determinations.

(2) Bargaining in the Peabody store alone would invite other disruptions in the centralized policies of respondent's operations, — (a) The union at the Peabody store could lawfully require the respondent to bargain on the size of the store crew, thereby preventing respondent from applying the chain-wide data to determine the number of man-hours of employment to be allowed to each department in the store; (b) a union in a single-store

[37] Supplemental Decision, see Petition, p. 44.
[38] Board's Decision and Order of February 3, 1965, J.A. 317-318.

unit might well bring an end to the practice of having uniform rules in all 7 stores (See J.A. 166-167; R. Ex. 12); (c) respondent might well be prevented from continuing its long-standing practice of transferring employees from one store to another. A union in the Peabody store might well object to having overtime work in that store being given to employees from one of the other stores (J.A. 174-175); (d) if it became necessary to reduce the workforce because of a decline in business, the union might well object to an employee from another store being given priority over an employee in the Peabody store where the priority was based on the extent of company-wide seniority (See J.A. 123-124, 260-261, 272-273); (e) and as was validly pointed out by the two dissenting Board members in *Frisch's Big Boy Ill-Mar, Inc.*, 147 NLRB 551, 553-557, a union calling a strike at a single unionized store could lawfully picket the other stores, although the union did not represent the employees of the other stores. *International Brotherhood of Teamsters (Alexander's Warehouse and Sales Company)*, 128 NLRB 916. The Board's decision would unstabilize labor relations in the instant case in a sense never contemplated by Congress when it authorized the Board to make bargaining unit determinations.

(F) *Board's Failure to Treat with Trial Examiner's Rulings.* The trial examiner, in questioning the materiality of certain evidence bearing on the unit question, indicated his misunderstanding of the importance of the unit issue in a Section 8(a)(5) case where he stated, "Well, I'm not going into a full representation hearing here." (J.A. 120). The trial examiner excluded highly relevant evidence: — that when respondent purchased its Winchester store in 1961, it automatically placed its chain-wide wage policy into effect in that store (J.A. 181); that respondent had a policy, applicable to employees of all

stores, of paying the difference between the employee's normal week's wages and the compensation derived from serving on a jury or when called to National Guard or Reserve duty (J.A. 184). In its February 3, 1965 decision, the Board stated it had ". . . reviewed the rulings of the Trial Examiner . . . and finds no prejudicial error was committed." The Board affirmed the rulings. Its Supplemental Decision fails to mention the trial examiner's rulings.

The Board's 8(a)(5) decision can hardly be said to be supported by substantial evidence on the record considered as a whole. Its decision on the unit question may also be fairly characterized as being unreasonable, arbitrary, and even capricious, the latter term appearing particularly apt in describing the manner in which the Board treated Respondent's Exhibit 15 which deals with interchange of employees.

(G) *The Board's Presumption.* The petitioner contends that the court below rejected the Board's policy of holding a single-store unit presumptively appropriate, and points to the circuit court's statement that, "The Board's simple declaration that single store units are considered 'presumptively appropriate' adds nothing. . ."[39] While first adopting this presumption in *Frisch's* case,[40] the Board made it clear in that same decision that its decisions in such unit cases would continue to be based on the rule of *Sav-On Drugs,*[41] namely, a policy of deciding each case on the basis of all the facts in the particular case.

Such a presumption is a rebuttable one, and where rebutting evidence is offered, the presumption disappears as a rule of law, and the case must be decided on the

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[39] Petition, p. 56.
[40] 147 NLRB 551 (1964).
[41] 133 NLRB 1032 (1962).

evidence on the record considered as a whole. 9 *Wigmore on Evidence,* 3d ed., § 2491(2) and (3). It is difficult to understand how the petitioner states that, ". . . no factors rebutting the presumption were present."[42]

In arguing that the court below rejected the Board's policy of applying the presumption, the petitioner misreads the opinion of the court below. The circuit court's decisions of December 30, 1965 and May 8, 1967, were both based on a detailed review of all the evidence on the record as a whole.

The statement in the latest opinion of the court of appeals that, "The Board's simple declaration that single store units are considered 'presumptively appropriate' adds nothing. . . ."[43] appears after a lengthy, detailed discussion of the evidence concerning the unit question.[44] Senior Circuit Judge Woodbury, writing for the court below, said:

> "The evidence and the Board's specific findings based thereon disclose a small, compact, homogeneous, centralized and integrated operation. The findings now made confirm this court's previous view that 'it would be difficult to find a more integrated operation, or less difference among employees.' "[45]

What Judge Woodbury says is that, after reviewing the substantial evidence rebutting the presumption and considering the evidence on the record as a whole, the Board's statement that a single-store unit is "presumptively appropriate" — adds nothing in the overall context of the case.

That the court had, indeed, arrived at its decision on

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[42] Petition, pp. 8-9; See Board's Supplemental Decision, Petition, pp. 46-47.
[43] Petition, p. 56.
[44] *Id.*, pp. 48-56.
[45] *Id.*, pp. 54-55.

the basis of the record considered as a whole is further sustained by the court's statement that:

> "Under some circumstances a single store in a retail chain may constitute an appropriate bargaining unit. *But on the evidence and findings in this case* we can see no rational basis for fractionating the respondent's organization for purposes of collective bargaining." (Emphasis supplied) [46]

II. THE DECISION OF THE COURT BELOW IN SETTING ASIDE THE BOARD'S SECTION 8(a)(5) ORDER WAS CONSISTENT WITH THE PROPER SCOPE OF JUDICIAL REVIEW.

(A) In *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 490-491 (1951), this Court, in treating with the responsibility of the circuit courts in reviewing Board orders, stated that the circuit courts had responsibility for "assuring that the Board keeps within reasonable grounds", and in this connection, this Court said:

> "Our power to review the correctness of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals. This Court will interfere only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

Since the petitioner's contention here raises only an evidentiary issue which was resolved against the petitioner by the court of appeals, the petitioner's contention does not warrant review by this Court. It is clear from the facts summarized in the Statement (pp. 2-7, *supra*) that the Board's unit determination is not supported by substantial evidence on the record considered as a whole.

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[46] *Id.*, p. 55.

(B) This is not a rare instance where the standard of review "appears to have been misapprehended or grossly misapplied" by the court below. The Board's Supplemental Decision states that ". . . we have consistently upheld the appropriateness of such a [single-store] unit where sought. . ."[47] The petitioner here misstates its own record of decisions issued subsequent to the 1962 *Sav-On Drugs* decision. In a number of its post *Sav-On Drugs* cases, the Board has held a single-store unit to be inappropriate, and has held a multi-store unit to be the only appropriate unit. *Caribbean Restaurants, Inc.*, 162 NLRB No. 60 (1967); *Mary Carter Paint Co.*, 148 NLRB 46 (1964); *Weis Markets, Inc.*, 142 NLRB 708 (1963); *Meijer Supermarkets, Inc.*, 142 NLRB 513 (1963). See: *Clermont's, Inc.*, 154 NLRB 1397 (1965) and cases cited in footnote 13.

The Board's statement that it has applied the unit policy of *Sav-On Drugs* in more than 30 formal decisions[48] issued since *Sav-On Drugs*, indicates that the Board's retail unit decisions, even subsequent to the *Frisch* decision, rest upon all of the relevant facts in the particular case rather than resting on a presumption. Indeed, most of the Board's retail unit decisions since the 1964 *Frisch* case, *supra*, have made no reference to any presumption and have been based on "all the circumstances" of the particular case. *Lou De Young's Market Basket*, 159 NLRB No. 54 (1966); *J. L. Hudson Company*, 155 NLRB 1345 (1965); *Big Bear Stores Company*, 155 NLRB 75 (1965); *Primrose Super Market of Salem, Inc.*, 148 NLRB 610 (1964); *J. W. Mays, Inc.*, 147 NLRB 968 (1964); *Leeds Shoe Store*, 149 NLRB 500 (1964); *Mary Carter Paint Co.*, 148 NLRB 46 (1964). See, also, *Clermont's, Inc.*, 154 NLRB 1397 (1965). It is submitted that the decision of the court below was based

[47] Petition, p. 46.
[48] Petition, pp. 12-13.

upon the court's review of all of the evidence on the record considered as a whole.

(C) *There is No Conflict between Circuits.* The petitioner concludes its argument by stating, "The issue thus emerges well defined: it is the validity of the single-store policy."[49] The petitioner contends that the conflict which exists between the First Circuit on the one hand, and the Third, Sixth and Ninth Circuits, on the other hand, arises from Judge Woodbury's statement that the presumption added nothing to the instant case, the petitioner arguing that this constituted a rejection of the Board's right to hold a single-store unit presumptively appropriate.[50] Petitioner cited, in this connection, *N.L.R.B.* v. *Sun Drug Co.*, 359 F.2d 408, 412-413 (3rd Cir.); *N.L.R.B.* v. *Winn-Dixie Stores, Inc.*, 341 F.2d 750, 755 (6th Cir.), enforcing 143 NLRB 848, 860-861, *cert. denied*, 382 U.S. 830; *N.L.R.B.* v. *Merner Lumber and Hardware Co.*, 345 F.2d 770, 771-772 (9th Cir.), enforcing 145 NLRB 1024, *cert. denied*, 382 U.S. 942. The petitioner also directs attention, in this regard, to *N.L.R.B.* v. *Primrose Super Market of Salem, Inc.*, (1st Cir.), 58 LRRM 2863, enforcing without opinion 148 NLRB 610, *cert. denied*, 382 U.S. 830. In every one of those decisions, although a single-store unit was determined appropriate, there was no mention whatever of any presumption, and in every one of those cases, the determination is clearly indicated as having been made on the basis of all of the relevant factors in the particular case. The same standard of review was applied by the court below in the instant case.

The single-store unit was determined to be appropriate in the cases cited by the petitioner, because of a difference in facts as between those cases and the instant case. Such a factual difference in no way establishes a conflict be-

[49] Petition, p. 18.
[50] Id., pp. 12-18.

tween the circuits, either on a question of substantive law or on a question of the proper scope of judicial review.

(D) *Additional Question Warranting Argument if Certiorari is Granted.* Respondent believes that the petition for certiorari should be denied for the reasons set forth above in this brief, but in the event that this Court should grant certiorari, respondent respectfully requests that the Court permit argument on the following additional question:

> "Was the union's claim to majority status tainted and rendered invalid because of threats and coercion by those soliciting union authorization cards from respondent's employees?"

Having found that Richard LeGrow, a 17-year old employee was threatened with physical violence to make him sign a union authorization card (J.A. 250-252), the Board would simply disregard his card in determining whether the charging union had acquired majority status. The court below left the Board's ruling on this point undisturbed; although the court felt the Board's ruling to be "very close to impermissible" (Petition, p. 21). Neither the Board nor the court below mentions additional evidence that employees Marion Sawyer and Robert Smith were subjected to coercive conduct by those soliciting for the union (J.A. 189-190, 217-218). Respondent contends that such evidence rendered the union's claim to majority status invalid, and for that additional reason the Section 8(a)(5) refusal-to-bargain charge should be dismissed.

In *General Shoe Corporation*, 77 NLRB 124, 127 (1948), the Board established its principle that its elections should be held under laboratory-like conditions. The Board has set aside elections upon a showing that a single employee has been threatened or coerced. *U.S. Rubber Co.*, 86 NLRB 3; *Poinsett Lumber and Manufacturing Company*, 116

NLRB 1732; *N.L.R.B.* v. *Tampa Distributors, Inc.*, 272 F.2d 470 (5th Cir.); *N.L.R.B.* v. *James Thompson & Co.*, 208 F.2d 743 (2nd Cir.).

Respondent urges that an equal and even stricter yardstick of conduct should apply where, as here, a union seeks recognition via a refusal-to-bargain charge and without election. The decision of the court below on this question, is in conflict with the decision of the Second and Fifth Circuits. *N.L.R.B.* v. *Tampa Distributors, Inc., supra; N.L.R.B.* v. *James Thompson & Co., supra.* In *James Thompson & Co., supra,* the court denied enforcement of an 8(a)(5) order, Circuit Judge Learned Hand stating that it was not necessary to show the extent to which the coercion permeated employees in the bargaining unit. See: *N.L.R.B.* v. *Gorbea, Perez & Morell,* 300 F.2d 886 (1st Cir.).

If certiorari is granted, this additional question warrants review because of a conflict between circuits and because it is an important question arising under the administration of the Act.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Appendix A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

. . .

REPRESENTATIVES AND ELECTIONS

SEC 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or

other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

. . .

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. . . . (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings,

by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.